

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1979 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

JASHVANTSINH J GOHEL

Versus

STATE OF GUJARAT

Appearance:

MR Prabhakar UPADHYAY for Petitioner
Mr. S.T.Mehta, Asst. Government Pleader
for the respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 17/09/98

ORAL JUDGEMENT

By means of this petition, the petitioner
has sought for quashing the order dated 3rd April, 1986

Annexure "D" to the petition passed by the Superintending Engineer, Karjan Irrigation circle, Rajpipla, passed on [the basis of the order dated 31.3.86 of the Under Secretary, Government of Gujarat, Narmada Development Department, whereby the petitioner was directed to retire from Government service at once under clause 9aa)(i)(1) of Rule 161(1) of the Bombay Civil Service Rules, 1959 (hereinafter referred to as the Rules) as amended from time to time. The petitioner was also directed to be paid three months' notice pay and allowances in lieu of the notice period as laid down under the aforesaid clause. The petitioner has further prayed for a direction to the respondents to continue him in service on the post of Deputy Executive Engineer, Rajpipla.

2. The petitioner joined the services of the State Government on 31st July, 1956 and he worked in various capacities including that of supervisor and was working as Deputy Executive Engineer with Narmada Development Authority at the relevant time. The petitioner was communicated adverse remarks for the period from 1.4.84 to 31.3.85 made in para III which are in the following words:

"Even after reminders made personally, no initiative is taken and also not ready to assume responsibility."

The petitioner made a representation dated 20.12.85 against the aforesaid remarks. Though affidavit-in-reply has been filed, this fact has not been controverted. That representation has not been decided by the authority till this date. The date of birth of the petitioner is 9.6.1929 and he was to retire at the age of 55 years on 9.6.84. He was allowed to continue in service till 3.4.86 when the impugned order was communicated to the petitioner and the date of retirement age of 58 years was 9.6.87. The petitioner received the order directing him to retire from Government service. The order dated 31.3.86 was communicated to the petitioner 3.4.86 directing him to retire from Government service at once. The impugned order reads as under:

" In accordance with clause (aa)(i)(1) of rule 161(1) of BCSR,1959 as amended from time to time, Shri J.J. Gohel, Deputy Executive Engineer (CA), Cost Control Unit under the Superintending Engineer, Keratin Irrigation Circle, Rajpipla shall retire from Government service at once.

Shri Gohil is hereby paid three months notice pay and

allowances in lieu of the notice period as laid down under clause (aa)(i) of the aforesaid Rules."

3. The learned advocate for the petitioner submitted that the order of premature retirement is arbitrary and it is not passed in public interest.

4. The learned Assistant Government Pleader Mr.Mehta for the respondents submitted that the matter of the petitioner was sent to the Review Committee and the Government has absolute power to direct any person to retire at any time and that power can be exercised on Government servant even on attaining the age of 55 years or at any time thereafter. During the last several years, performance of the petitioner was considered by the Government and having considered such performance, the Government came to the conclusion that further continuance of the petitioner in Government service would not be in public interest and gave a list of adverse remarks.

5. The learned advocate for the petitioner produced a copy of the order expunging remarks regarding the period from 30th May,1983 to 15.9.1983 and 15.10.83 to 31.10.83. Overall assessment was shown in column no.10 on the basis of item no.1 and 4. That he was on an average officer. Item no. 4 of form B in item no. 4, the speed was shown average and item no. 4 of part IV overall assessment including mention of outstanding working, if any, was shown as average. The conclusion arrived at on different items was of an average officer which was expunged by the order dated 20th April, 1985. So far the adverse remarks for the period from 26th December,1983 to 31.3.1984 is concerned, overall assessment in item no.10 of the petitioner was shown as average officer. Similarly, in B form speed was shown as average and overall assessment in part IV item was shown as average officer and these remarks were also expunged by the order dated 29.4.85. As such, no adverse remarks remained against the petitioner in respect of the year 1983-84. While in respect of the year 1984-85, the petitioner had moved a representation against the adverse remarks which has not been considered and disposed of by the authority concerned.

6. It was also submitted by the learned counsel for the petitioner that irrelevant consideration has also been taken into account by the authority concerned. The petitioner applied on 30.3.86 for

counting leave from 1.4.86 to 11.4.86 on the ground of sickness of his father as per medical certificate dated 12.3.86 issued by the Superintendent, Civil Hospital, but it was not stated whether presence of the petitioner was required. Hence, leave asked for was not sanctioned upto 3.4.1986. In support of his contentions, the learned advocate for the petitioner has relied on the judgment in the case of H.C. Gargi vs. State of Hariyana and others reported in AIR 1987, SC, 65 wherein the Supreme Court has laid down that the concerned authority must be of the opinion that it is in the public interest to do so. In that case, representation of the petitioner of that case against adverse remarks made by the Commissioner was pending under consideration and the Government passed the impugned order of compulsory retirement. Thereafter, it rejected the representation. Unless and until the authority comes to the firm opinion that the compulsory retirement of the person concerned is in public interest, the order will be deemed to be arbitrary.

He also relied on the judgment in the case of State of Sikkim and others vs. Sonam Lema and others reported in AIR, 1991, SC, 534. in which the Supreme Court confirmed the opinion of the High Court in dismissing the appeal on the ground that the report did not state that in the public interest, the officer cannot be continued. The assessment performance of the officer is only to the effect that there are better talented persons available in the department and the work performed by the official could be better than done by more qualified persons and that was only an extraneous consideration for compulsorily retiring any official.

7. The learned counsel for the petitioner also relied on the judgment in the case of S. Maheshwara Rao vs. State of Others reported in 1989 (2) Supplement Volume II SCC, 248 wherein it is held by the Supreme Court that the Tribunal committed a serious error. Admittedly, adverse entries for the year 1981-82 and 1982-83 were communicated to the appellant on 29th July, 1983 and under the Rules, the appellant was entitled to make a representation against those entries within six months from the date of communication. The Review Committee met on October 11, 1983 and by that time, six months's period had not expired and before that date, the appellant had not made any representation, but did not disentitle him from making a representation. The appellant made a representation against those adverse entries on October 19, 1983 within time. The same was not considered or disposed of by the State Government. The Government issued the impugned order on November 10, 1983

retiring him prematurely. The course adopted by the Review Committee and the State Government resolved in denial of opportunity to the appellant from making a representation against adverse entries awarded to him. The appeal of the petitioner was allowed and the order of the Tribunal and that of the State Government were set aside by the Supreme Court in that case.

8. The learned Counsel for the respondents in reply contended that the overall assessment for the last 10 years was considered by the Review Committee and the Review Committee came to the conclusion that the services of the petitioner were not desirable in future in the public interest. Hence, the impugned order had to be passed. In this regard, he relied on the judgment in the case of N C Dalwadi vs. State of Gujarat and others reported in AIR 1987, SC, 1933, wherein it is held that the Government may terminate the services of the permanent government servant under the first proviso to rule 161(i) of the Rules at any time or after he attaining the age of 55 years after giving three months' notice before the normal age of superannuation. The power of the Government under the first proviso to direct premature retirement does exist on its satisfaction that it is necessary to do so in the public interest. The stand of the petitioner in that case that was also whether the impugned order could be passed by the State Government under the first proviso to Rule 161 or Rule 161(1)(ii)(1) of the Rules. The learned counsel for the State relied on the observations of the Supreme Court that power can be exercised subject to the conditions mentioned in Rule one of which is that the concerned authority must be of the opinion that it is in the public interest to do so though the appeal was allowed by the Supreme Court on different ground.

9. The main controversy in hand is whether the impugned order is arbitrary or was passed in accordance with the provisions of the relevant Rules and after subjective satisfaction of the authority concerned. The impugned order has been passed under Rule 161(1) of the Rules which reads as under:

"1161(1)(a) Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant other than a class IV servant, is the date on which he attains the age of 58 years.

Provided :

(i) Deleted

(ii) Deleted

(iii) He may be retained in service after the date of

compulsory retirement only which the previous sanction of Government on public grounds which must be recorded in writing.

(aa) Notwithstanding anything contained in clause (a):

(i) An Appointing Authority shall, if he is of the opinion that it is in the public interest to do so, have the absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months pay and allowances in lieu of such notice:

(1) If he is in class I or class II service or post or in any unclassified gazetted post, the age limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age of 50 years...."

10. From the impugned order, it does not appear that it was passed in the public interest as nowhere it is mentioned that the authority was of the opinion that it is in the public interest to continue his services of the petitioner. Only one line cryptic order has been passed that the petitioner will retire from the Government service at once and he will be paid three months notice pay and allowances in lieu of the notice period. The learned counsel for the respondent produced the original report and that shows that the matter was placed for the first time before the Review Committee. The Review authority considered the confidential record of the petitioner and came to the conclusion that Shri Gohel has been Deputy Executive Engineer for a long time. The file placed before it was for 1977 onwards. He has been Deputy Engineer at least from 1977. It was not considered proper to revert him to lower post. Shri Gohel will be completing 57 years on 8.6.86. Keeping that CR which reflects that he is only an average officer and that he will be completing 57 years in June, 1986 and that he has been working as DEE for a long time by now. He need not be given an option to revert to lower post. In the circumstances, Shri Gohel be retired from service by giving him three months salary.

11. The only relevant consideration before the authority concerned was that the petitioner has been working as DEE since long and the authority did not consider it proper to revert him to lower post as he was found to be an average officer. Hence, he was directed to be compulsorily retired with three months pay and

allowances in lieu of the notice. No finding has been recorded by the Reviewing Committee that services of the petitioner were not required to continue in public interest. The only consideration was that he was to attain 57 years on 9.6.86. If in case, the service of the petitioner were not satisfactory, he should have been reverted to the lower post and it was not proper to continue him till the age of 57 years.

12. This Court has granted ad-interim relief in favour of the petitioner which order was continued upto 12.9.1986. Thereafter, in absence of any extension of interim order, the petitioner was directed to retire with effect from 17.9.86. It appears that the learned counsel for the petitioner was under an impression that interim order was till further orders. Hence, he did not apply for extension of the last order dated 29.4.86. In case he would have applied for extension of that ad-interim order, either that interim order should have continued till further orders till the superannuation of the petitioner on 9.6.87 or could have been vacated. The circular dated 25th October, 1966 Annexure "E" shows that the authorities were under an obligation to come to the conclusion, as a result of examination that the Government servant should be retired prematurely and they should record fully and clearly considering the reasons for their conclusions and where it is necessary to obtain previous approval of the superior authority or Government, reference in that regard should give full indication of the considerations and reasons for the proposal. It was also necessary that this process should be completed in each case within three three months time so that in that event of retirement being finally decided upon dispensing with service of notice on the Government servant concerned at least three months before the date of which he attains the age of 55 years and his retirement could be given effect to as soon as possible. It was also made necessary that a notice should be served on the Government servant concerned only after this process has been undergone through. No doubt, in the present case, the authority had gone through the process but, being only factor that the petitioner had been working as Deputy Executive Engineer for a long time, since 1977, being an average officer was not considered proper to be reverted to his lower post and he was to attain the age of 57 years on 9.6.86. Hence, the impugned order was passed. Extraneous considerations have been entered into while passing the impugned order. No doubt, it does not show that it is passed in the public interest and the adverse remarks most of them have already been expunged and representation of the

petitioner regarding adverse remarks for the year 1984-85, is still pending and that has not been disposed of by the authorities concerned. The order does not appear to be just and proper in the facts and circumstances of the case. On the other hand, it appears to be an arbitrary order.

13. Accordingly, the petition is allowed and the order dated 31st March, 1986 passed by the respondent no.1 prematurely retiring the petitioner from service is quashed and set aside and the petitioner is deemed to be in service from the date of the impugned order till his the date of his superannuation i.e. 9.6.87 with all consequential benefits. The respondents are directed to treat the petitioner in service till 9.6.87 and settle all other consequential benefits within three months from the date of producing a certified copy of this judgment. The respondents are also directed to pay all arrears of pay and allowances to the petitioner within a period of three months thereafter. Rule is made absolute accordingly with no order as to costs.

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